



STATE OF IDAHO

DEPARTMENT OF HEALTH AND WELFARE

LEGAL SERVICES DIVISION
450 W. STATE - 10TH FLOOR
BOISE, ID 83720

MEMORANDUM

DATE: March 10, 1989
TO: Cathy Chertudi
Water Quality Bureau
FROM: Susan Burke *SB*
Deputy Attorney General
RE: Avery Landing Petroleum Contamination

This memo is in response to your request concerning the legal basis for requiring a clean up of a non-hazardous waste site. The following is meant for use within the Department and should not be distributed outside the agency.

The St. Joe River is designated as a Special Resource Water. It is also protected for general use of all designated uses. IDAPA 16.01.2110,01.gg. By definition, a special resource water is a specific segment or body of water which is recognized as needing intensive protection to preserve either outstanding or unique characteristics or to maintain current beneficial uses. IDAPA 16.01.2003,45. It is this river which currently has a sheen on it from petroleum seeping in through its banks.

Water Quality Regulations

The Department may be able to find a violation of its water quality regulations and thus require a clean up of the contamination through them. IDAPA 16.01.2200,02 states that "as a result of man-caused point or nonpoint source discharge, waters of the State must not contain deleterious materials in concentrations that impair designated or protected beneficial uses without being hazardous." As petroleum is not considered a hazardous material, it would have to be argued that it fits the definition of a deleterious material. This should not be a problem. The phrase "impair designated or protected beneficial uses" means to worsen or diminish those uses. It can be argued that the contamination impairs the recreational use of the river, especially swimming. It may also be argued as impairing other designated uses. The present land owners could be found to be in violation of this regulation as they are not containing the contamination and thus allowing it to enter the river. This argument should be valid even though none of the present land owners originally caused the discharge.

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The regulation regarding the storage of hazardous or deleterious materials, IDAPA 16.01.2800, may pertain to the Potlatch in this situation. If potlatch had control of the fuel tank from 1980 when it obtained the property until 1986 when it removed the tank, the corporation may have violated the above regulation. The cause of action depends on whether or not the tank was leaking while under Potlatch's control. Fuel lines should also qualify as a storage facility and if leaking during Potlatch's ownership, may be cause for a violation. In any event, it is known that Potlatch did not report any contamination at the time the tank was removed. If contamination was present, this inaction may have been a violation of IDAPA § 16.01.2850. This again would depend upon whether leaks occurred during Potlatch's ownership.

Any action against the railroad company based on a violation of the water quality regulations would most likely be beyond the statute of limitations in the EPHA.

Statutory Nuisance

The Idaho Code defines a nuisance as "anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, ...". Idaho Code §52-101. A public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Idaho Code § 52-102. The remedy for a nuisance is to enjoin the activity or have it abated as well as recover damages. Idaho Code § 52-111. Successive property owners who neglect to abate a continuing nuisance are liable in the same manner as the person who originally created it. Idaho Code § 52-109.

The Department should be able to argue that the petroleum seeping into the river is a public nuisance which must be abated. Although not necessarily injurious to health, the contamination is offensive to the senses. It can also be said that the contamination affects all the people wishing to use the St. Joe for recreational purposes. The present land owners cannot claim as a defense that they did not create the nuisance as by statute they are just as liable.

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In summary, the Department may argue to present landowners that they are in violation of water quality regulations in that they are allowing a deleterious material to enter a state water. The land owners are also creating a public nuisance for the same reasons. Both the water quality regulation and the nuisance statute should allow the Department to require a clean up by the present land owners. It should be emphasized to the owners that the St. Joe river is a special resource water and as such the state is especially concerned with cleaning up any amount of contamination in it.

SB/pg